IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 212.

THE DELAWARE AND HUDSON COMPANY, THE ALBANY AND SUSQUEHANNA RAILROAD COMPANY, RENSSELAER AND SARATOGA RAILROAD COMPANY, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANTS.

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A.

By their motions to dismiss, appellees admit that the Interstate Commerce Commission's order of March 28, 1923, in issue in this proceeding, does not comply with the statute and that, because of the deficiencies and infirmities of that order, appellants were unable "to protect their rights by an adequate and proper and sufficiently full and detailed protest"—Petition, R. 5.

Numerous defects in the order of March 28, 1923, including omissions and refusals to comply with the

law are alleged in the petition (*R. 1-13*) and it is also alleged that on account of them, appellants were unable to make the protest necessary "to protect their rights"—*R. 12*. These well-pleaded facts are, of course, admitted by the motions to dismiss—*R. 233, 234*. Appellees can not now avoid the consequences of these motions, which deprived appellants of opportunity to prove their allegations, by bald or qualified assertions that the law was obeyed or *partially* obeyed; they have formally admitted that it was not obeyed and must accept the consequences of that admission. As an illustration of an attitude that is inconsistent with the admissions made by the motions to dismiss the following extract from the *Brief for the United States* is presented.

> "Close inspection of the 'tenative valuation' will demonstrate that the Commission in all respects and as far as was humanly possible strictly complied with the statute"—*Brief for the United States, pp. 13-4.*

Even if it were permissible for appellees to take the position suggested they are squarely refuted upon the record. For example, the statute requires that, as to each common carrier to be valued, the "tentative valuation"—

> ". . . shall show . . . separately the value of its property in each of the several states and territories and the District of Columbia, classified and in detail as herein required"—*Section 19a, par. (c); R. 3.*

The Commission *refused* to comply with the foregoing; this was well-pleaded by appellants (*R. 8*), and is admitted by the motions to dismiss. It is "humanly possible" to comply with the foregoing; the Commission is of opinion that this provision can be complied with and has formally so stated. On December 29, 1922, its

Chairman, writing in that capacity to the President of the Senate, said, in part:

> "Up to the present time we have not undertaken to segregate by states the single-sum value of interstate carriers . . . we have collected the basic material from which information as to the values separately by states can be compiled"—*Senate Document No. 284, 67th Congress, 4th Session, pp. 3-4.*

Other well-pleaded infirmities in the contested order of March 28, 1923, include (1) refusal to ascertain and report the value of the property as a whole, (2) refusal to ascertain and report anything with relation to railway property used by the carrier actually under valuation but owned and also used by another carrier, (3) arbitrary use of prices of a date or period long prior to the valuation date and materially lower than prices current at that date, (4) refusal to ascertain and report original cost except to the extent that records are available, (5) refusal to report analyses and reasons and (6) arbitrary exclusion of part of the working capital actually owned and used. Appellants submit that they have established, by their first brief, (*a*) that all these requirements of the statute are practicable and (*b*) that the refusals and omissions of the Commission are actually and in each case, based, not upon impossibility, but upon a misconception by the Commission of the law and of its relation to the subject—*Kansas City Southern* vs. *Interstate Commerce Commission, 252 U. S., 178, 187-8.*

B.

Numerous attempts "to confess and avoid," in briefs for appellees, show that the infirmities of the order of March 28, 1923, had their origin in "a mistaken concep-

tion by the Commission of its relation to the subject, resulting in an unconscious disregard on its part of the power of Congress and an unwitting assumption by the Commission of authority which it did not possess," closely parallelling the misconception corrected in Kansas City Southern v. *Interstate Commerce Commission, supra.*

In the *Kansas City Southern case, supra,* it appeared that the Commission had refused to attempt to ascertain a certain fact which Congress had, in terms, commanded it to include in each "tentative valuation," grounding its refusal upon its interpretation of a part of the opinion in the *Minnesota Rate cases, 230 U. S., 252.* The vice in this refusal, clearly pointed out in the cited case, was that the Commission erroneously considered itself authorized to decline to comply with a specific direction in the *Valuation Act, supra,* whenever its own opinion was that the data thus pointed out would not aid, or ought not to be considered, in determining value. The principle which the decision in the *Kansas City Southern case, supra,* applied and sanctioned is that the direction of Congress must be followed, regardless of the opinion of the Commission as to its wisdom. This principle does not appear to have become as clear to appellees' counsel as it is in the cited opinion of this Court. If it were, the Commission's counsel would scarcely have been willing to confess refusal to value to appellants some thirty-five miles of their main line (*R. 8*), and other railway property which they use (*R. 8-9*), and seek to avoid the consequences of this admission by asserting that—

> "The Commission has tentatively concluded that said properties must be inventorized to the owning carriers, and that under the circumstances described it would not be proper to include any portion thereof in the inventory of said appellant."—*Brief for Interstate Commerce Commission, p. 8.*

The foregoing baldly disputes the wisdom of Congress in directing the Commission to—

> ". . . report the value of all the property owned or used by every common carrier, subject to the provisions of this Act."—*Section 19a, par. (a); R. 2.*

and declaring, also, that—

> ". . . said Commission shall ascertain and report in detail as to each piece of property . . . owned or used by said common carrier for its purposes as a common carrier."—*Section 19a, par. (b); R. 2.*

Similarly, the *Brief for the Commission* admits that the order of March 28, 1923, contains nothing as to the value of the property of any of appellants, "as a whole" (*Section 19a, par. (c); R. 3*), and offers, in avoidance, the following:

> "The final values included in the tentative valuation under consideration here do not include, and *are not intended to include, final values of any properties other than those used by appellants for common carrier purposes.* The right of the Commission . . . to perform first the duties it regards as important and urgent and to defer until a later date the performance of duties it considers less important and urgent, was recognized by this court in the *New England Divisions case, 261 U. S., 184.*"—*Brief for Interstate Commerce Commission, p. 11;* italics ours.

In other words, in its current valuation work, the Commission considers that it can modify the statutory definition of a "tentative valuation" in accordance with its convictions as to "importance" and "urgency," just as at an earlier stage it felt authorized to make another modification in view of its interpretation of the decision in the *Minnesota Rate case, supra.* The former error

was corrected in the *Kansas City Southern case, supra.* The reference to *New England Divisions case, supra,* is beside the point, for in that case the question was solely as to the nature and extent of the record required to support an order in regard to divisions of joint rates; while here the question is as to the force of a statutory direction to the Commission to do a certain thing, and as to the effect of a statutory definition, the Commission claiming authority to refuse to comply with the one and materially to vary and depart from the other. If the latter is permissible the greater portion of nine paragraphs of the *Valuation Act* constitute a mere complex of ineffective words; every definitory syllable might as well be stricken from the statute.

A parallel misconception of law by the Commission is represented by both briefs for appellees; in regard to original cost. They say:

> "Owing to inadequacy of the records original cost to date was not always ascertainable *from those sources*"—*Brief for the United States, p. 11;* italics ours.

> ". . . the Commission reported the original cost mentioned *to the extent that, in its opinion, it was possible to do so from appellants' records and other records*"—*Brief for the Interstate Commerce Commission, P. 10;* italics ours.

But the specific requirement of the statute is to ascertain and report the original cost of "each piece of property, other than land, owned or used . . . for . . . purposes as a common carrier; . . . of all lands, rights of way and terminals owned or used for the purpose of a common carrier" and of "the property held for purposes other than those of a common carriers"—*Section 19a, pars. (b), first, second and*

third; R. 2-3. There is no suggestion in the law that the Commission might exclude all evidence, except record evidence. Indeed, the direction to ascertain and report original cost is conveyed by the same sentence which contains the similar direction with regard to "cost of reproduction" and "depreciation" and by every rule of interpretation there could have been no purpose to exclude any class of evidence of "original cost" if that class of evidence was intended to be relied upon in connection with "cost of reproduction" or "depreciation." The *Brief for the United States* adds to the persuasive reasons for concluding that the Commission, in excluding all evidence of "original cost" except record evidence, has seriously misconceived the law and its own function; the following statement as to ascertainment of original cost, made by the Senator who reported the bill which became the *Valuation Act:*

> ". . . You will find the opinion expressed by theorists upon the subject that to do so is impossible. But we have had in Wisconsin—they have had in the State of Washington and in other States—an experience that contradicts these theories. It is possible to ascertain this original cost"—*Brief for the United States, Appendix B, p. 68.*

The "environment in which Congress passed the *Valuation Act*" (*Brief for the United States, pp. 14-22, 42-78, 99-101*) abundantly exhibits and establishes the anxiety of Congress to provide for obtaining *all the evidences of value* through the labors assigned to the Commission—*See appellants first brief, pp. 16-9.* During the discussion on the floor of the Senate, quoted at length but not completely in the *Brief for the United States* (*pp. 67-78*) Senator Cummins, of Iowa, Chairman of the Committee from which the bill was reported, said:

> ". . . we are simply attempting to furnish the people of the country the evidence from all

> the various standpoints, which they can not furnish themselves because of the vastness of the undertaking"—*Congressional Record, February 24, 1913, p. 3802.*

And, at a later point, the same Senator said:

> "This bill is intended to authorize the Interstate Commerce Commission to send its appraisers, its experts, and secure almost all the information that is conceivable with regard to the value of railway property"—*Congressional Record, February 24, 1913, p. 3803.*

On the same occasion, the late Senator Newlands, said:

> "The Senator from Wisconsin (Mr. La Follette) with that great care and precision with which he always moves in matters relating to economic legislation, has insisted that we should in the bill itself present the principles of valuation and define and secure the ascertainment of the different elements of value, *every element of value which could possibly be considered by a court in determining the question of fair valuation*, and this bill, I think, is very accurately framed along that line"—*Congressional Record, February 24, 1912, p. 3806.*

The misconception of law on the part of the Commission is not only similar to that in the *Kansas City Southern case, supra*, but also like that corrected in the *Interchangeable Mileage case, United States* vs. *New York Central, 263 U. S., 603, 609-610.*

C.

Many important questions, affecting the general public and many carriers, can be settled in this proceeding by awarding the relief sought by appellants and thus instructing the Commission as to its duties under the Valuation

Act; any other conclusion of this proceeding must postpone the settlement of these questions and lead to prolonged litigation, unnecessary expense to the public and the carriers and vexations and troublesome delay.

Appellees advise this Court, in this proceeding, that:

> ". . . of the 1138 operating common carriers . . . it is inconceivable that any of them will be satisfied with the tentative valuation made by the Commission"—*Brief for the United States, p. 31.*

A member of the Commission, testifying before a sub-committee of the House Committee on Appropriations, on May 22, 1924, declared that to June 30, 1924, the expenditures of the Commission on valuation work would amount to $25,363,673 and those of the railways to "something over $70,000,000".—*Testimony of Mr. Commissioner Lewis, Second Deficiency Appropriation bill, 1924, 68th Congress, 1st session, Hearings, etc., pp. 124, 125.*

The foregoing affords some measure of the expenditures heretofore occasioned and now in progress in connection with work under the *Valuation Act.* It is evident in this proceeding that this work is going forward without full compliance with the law and without recognition, on the part of the commission, of the consequences of such policies as, for example, those involved in (1) application of prices below those actually current on the valuation date, (2) arbitrary exclusion from valuation of portions of the common carrier properties actually used, (3) omission to consider competent evidence of original cost, (4) arbitrary exclusion from common carrier values of portions of the working capital actually used for common carrier properties, (5) refusal to ascertain and report the value of all owned properties, and others. Sometime and in some

way, all these questions will have to be settled. They can be settled here and now, by an exposition of the definition of a "tentative valuation" found in the *Valuation Act* and by requiring the Commission to obey the law and conform to the definition as expounded.

Such a conclusion in the instant case would not, as the Solicitor General fears, transfer the valuation work to the courts—*Brief for the United States, p. 29.* On the contrary, it would clarify and strengthen the valuation work of the Commission and place it upon the solid foundation of principles laid down by this Court. What would occur in the instant case, should the order of March 28, 1923, be enjoined, would be that the Commission, in due course, would enter a new order establishing a "tentative valuation" complying with the requirements of the law. There is no ground for anticipating that, with the work thus lawfully performed, appellants would find themselves disposed to protest the results. But if they should be so disposed, and should protest, the proceeding upon the protest would be before the Commission, in conformity with the statute. Appellants are not asking this Court, or any other court, to perform the functions or exercise the administrative discretion entrusted to the Commission. They are here to ask only that the Commission be constrained to exercise its great powers in the valuation of their properties in substantial conformity with the Congressional will as expressed in the statute under which the Commission acts.

No one will deny that this record raises important and far-reaching questions concerning the manner in which the Commission is operating under the *Valuation Act.* Equally, no one will deny that somewhere, at some time, appellants must have the right to have these important questions judicially determined. To determine them now will obviously avoid delay, prevent

further error by the Commission and avoid additional litigation.

The Court is asked not to overlook the fact that the departures from the requirements of the law herein complained against are shown to be deprecated and regarded as unlawful by several members of the Commission.—*Appellants' first brief, pp. 18, 28, 32, 33, 34, 54, 55, 61, 62, 64, 66, 67, 78, 93, 126, 136, 165, 173-186, 187-9.* Indeed, in the *National Conference on Valuation of Railways decision, 84 I. C. C., 9,* it would appear that the action was that of but four Commissioners, or, at least, that but four members of the Commission concurred in the reasons for the action that were assigned. Such questions must, so far as they are justiciable, and every question whether an administrative body has acted in accordance with the statutory grant of power is justiciable, at some time be determined by the judiciary. They can be so determined with notable profit, at the time; their postponement involves inevitable confusion, difficulty, and loss.

D.

Some further misconceptions of appellees.

1. The initial indication of a misconception of the *Valuation Act* (*Section 19a of the Interstate Commerce Act, 37 Stat., 701*) appears in the first line of the front cover of the *Brief for the United States*, where the SOLICITOR GENERAL assumes to entitle this case "VALUATION OF COMMON CARRIER PROPERTIES." Such entitlement would be materially narrower than the purview of the statute, which, in terms, provides for ascertaining the value of—

> ". . . all the property owned or used by every common carrier subject to the provisions

of this Act."—*Section 19a, par. a; R. 2; Brief for the United States, 2.*

Obviously, "property owned or used by" a common carrier is much more comprehensive than "common carrier property." To entitle this case as suggested by the SOLICITOR GENERAL would be erroneous and misleading; a sufficient title would be, "VALUATION OF PROPERTIES OF COMMON CARRIERS."

2. The Senate Committee on Interstate Commerce did not make the statement attributed to it on *page 15* of the *Brief for the United States.* An effort to verify the reference to this rather enthusiastic expression shows that it was attributed, on the floor of the Senate by a Senator from Wisconsin (*Cong. Rec., Vol. 49, Pt. 4, n. 3795*), to the CULLOM Committee, which reported more than thirty-eight years ago. But that committee made no such assertion; it merely stated the charge as among those presented by witnesses it had heard—*Senate Report No. 46, 49th Congress, 1st session, pp. 180-1.*

3. As pages 8 to 9, 22 to 28, and 79 to 97 of the *Brief for the United States* contain matter relating to the amendment of June 7, 1922 (*42, Stat., 624*), to the *Valuation Act, supra,* it must be inferred that appellees consider that this Court's attention should be directed to the fact that when, by the decision in *Kansas City Southern* v. *Interstate Commerce Commission, 252 U. S., 178,* the Commission was advised that it should comply with the law, the Congress, upon the Commission's recommendation (*Brief of the United States, 23*), changed the law. Obviously, what Congress chose to do under such circumstances, in changing a particular clause of the Act, throws no light upon the purpose and effect of the portions of the Act that remain unchanged. Nor does this action of the Congress in relieving the Commission from

one requirement, by its excision, in any way suggest exemption from the requirements that remain; on the contrary, it emphasizes the binding character of every requirement that Congress has chosen to continue.

4. It is a misconception of law to suppose that the "usual and ordinary" meaning of a statutory term, *e. g.*, "tentative valuation," could prevail over an express definition contained in the statute in which it is found. This error appears in the *Brief for the United States* (*pp. 32-3*) in the form of references to "lexicographers' " definitions of the word "tentative." The Valuation Act, makes "tentative valuation" a purely statutory concept; it is particularly defined in nine paragraphs (*R. 2-4*). If, using this elaborate definition, the Congress had chosen to call the thing defined an "oblique valuation" or an "esoteric valuation," or anything else, the actual and substantial result would have been precisely the same—mere nomenclature can not vary any substance. Even the references to Mr. Spencer and Mr. Lewes in the footnotes (*Brief for the United States, p. 33*), however interesting as evidences of learning or industry, could have no effect to vary the definition in the statute. The Report of the Senate Committee, submitting the *Valuation Act, supra*, and recommending its enactment, said:

> "Under the terms of the House bill, whenever the Commission completes the valuation of the property of any common carrier, it is required to give notice and grant a hearing thereon to such carrier. . . . *The Senate committee amendment designates such completed valuation as 'tenative' . . .*"—*Senate Report No. 1290, 62d Congress, 3d session, p. 9; italics ours.*

The "Senate committee amendment" referred to in the foregoing was adopted and the bill as amended, was passed—*Brief for the United States, 21*. It is futile

to look beyond the Act for a definition that it completely contains.

5. The Interstate Commerce Commission, as one of appellees, and by its counsel, seems to attach some weight to an anticipation that appellants will not feel warranted in suggesting that a "tentative vaulation" has any probative force. Referring to the assertion of the District Court that "such valuation is without any probative effect *per se*," it is said that—

> "Because of the statements thus made by the lower court, *the correctness of which we feel certain will not be questioned by counsel for appellants*, we are unable to understand how it can be consistently contended that appellants or any of them will be subjected to legal injury or be harmed in any way if the order referred to is not annulled and set aside by the Court"—*Brief for Interstate Commerce Commission, p. 19; Italics ours.*

Evidently the foregoing was written without careful perusal of appellants' brief. Appellants consider that it is impossible to consider as of no probative effect, a statement of values that becomes effective if not protested and disproved and they conclude that the Commission is not going beyond the intent of Congress in holding that the "tentative valuation" is *prima facie* evidence in proceedings upon protests thereto. Moreover, they find that the Commission is every day, accepting these "tentative valutations" as evidence having great probative force, not only in valuation proceedings but in all other proceedings under its authority—*See first brief for appellants, pp. 102-152.*

In appellants' main brief it was shown that the Commission is regularly accepting the "tentative valuations" as evidence in cases involving valuation, issues of securities, leases and rates. It is now known that these "tentative valuations" are used, and intended to be used and accepted, as evidence, in cases under the so-

called "Recapture" clause of Section 15a of the Interstate Commerce Act. Honorable Ernest I. Lewis, member of the Interstate Commerce Commission, testified before a sub-committee of the House Committee on Appropriations on May 22, 1924, in support of an application of the Commission for an appropriation, in the Urgent Deficiency bill, of $350,000. Among other things, Mr. Lewis, concerning proceedings under the "Re-capture" clause, said:

> "We then have *tentative valuation* reports completed upon twenty-two per cent of the mileage. Now if on this list of recapture roads furnished by the Bureau of Finance we are called upon to supply valuation data, say for example, on the first one on the list, the Aberdeen & Rockfish Railroad, the first question is 'Is the *tentative valuation* completed?' If it is, we ascertain the net additions and betterments from the Order No. 3 returns for the period between the date of valuation and the recapture period. If, however, the *tentative valuation* is not completed we must immediately speed up the work on that particular road and *get out the tentative valuation* and then ascertain from the Order No. 3 returns what the property changes have been"—*p. 103;* italics ours.
>
> "Suppose we take the Big Four Railroad running through Mr. Wood's state, with its various branches. *We would take the tentative valuation*, if it had not become final, and the final valuation if it were final. *We would add to that original valuation the checked and audited summary of additions to or deductions from the properties from that date*"—*p. 109; Italics ours.*

The principal appellee, however, plainly appears to disagree with the other appellee, for the SOLICITOR GENERAL offers, as one of his major propositions of law, the following:

> "The *prima facie* effect of the tentative and final valuations was deliberately adopted by

> the Congress after full debate"—*Brief for the United States, p. 33.*

And, Mr. Commissioner Potter and Mr. Commissioner Cox have made the following statement of fact in a dissenting opinion:

> "We are constantly referring to our tentative reports and using their findings in determining the amount of allowable stock issues and otherwise in our work"—*Florida East Coast Railway, 84 I. C. C., 25, 45.*

However, this Court will not overlook the specific authority to the Commission to "utilize the results of its investigations under Section 19a of this Act, in so far as deemed by it available," contained in Section 15a of the Interstate Commerce Act—*See appellants' first brief, pp. 136-9.* Appellants conclude that the "tentative valuations" have probative force and are so used and accepted in practice that this force often becomes, in fact although it is not so in law, conclusive. They conclude also that the injury they suffer and that is threatened against them, by the order of March 28, 1923, is substantial and beyond relief save in this proceeding. Unless the order of March 28, 1923, can be set aside in this proceeding, on account of its many admitted, substantial and wilful departures from the law conferring authority to act at all in the premises, there is no departure from the statutory definition of a "tentative valuation" that can be corrected or restrained; in that case the Commission is beyond the law. Appellants are unable to believe that the creature of Congress can thus deny the Congressional will.

All which is respectfully submitted,

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